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IN THE

Supreme Court of the United States

No. 119 October Term, 195

SCHOOL DISTRICT OF THE BOROUGH OF SHENANDOAH

THE BOROUGH OF SHENANDOAH,
A Municipal Corporation Organized Under the Laws of the Commonwealth of Pennsylvania,
Petitioners

vs.

CITY OF PHILADELPHIA,
Trustee Under the Will of Stephen Girard, Deceased,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on March 19, 1951.

Opinions Below

The opinion of the Court of Common Pleas No. 2 of Philadelphia County (R. 720a) unreported.

The opinion of the Supreme Court of Pennsylvania is reported in 367 Pa. 18.

Jurisdiction

The judgment of the Supreme Court of Pennsylvania was entered on March 19, 1951. The jurisdiction of the Court is invoked under 28 U. S. C. Section 1257 (3). The constitutional question here involved, namely the validity of the Pennsylvania Statute, the Act of May 27, 1921, P. L. 1198 (52 Purdon's Statutes §661), was raised in the Trial Court by Petitioner School District's fourth point for charge (R. 634a), and by Petitioner Borough's fourth point for charge (R. 636a). Both points were identical and read as follows:

> "IV. If you conclude that the subsidence was caused by the removal of pillars in the Kehley Run Mine in the vicinity of plaintiff's property, then defendant's conduct was unlawful and, as a consequence thereof, defendant was negligent under the provisions of the Act of May 27, 1921, P. L. 1198, 52 P.S. 661."

Both were declined by the Trial Judge and Exceptions noted for the Petitioners (R. 633a, 635a).

The question was raised on appeal to the Supreme Court of Pennsylvania by paragraph eighth of Petitioners' Statement of Questions to be argued on Appeal (R. 742a). While the question was argued extensively in Petitioners' Brief filed in the Supreme Court and at the oral argument, it was not dealt with specifically in the Supreme Court's opinion. Petitioners contend that the judgments of the Supreme Court affirming the judgments n.o.v. entered by the Trial Court necessarily presupposed the unconstitutionality of the Act of May 27, 1921, P. L. 1198 (52 Purdon's Statutes §661), upon the authority of the opinion of this Court in *Pennsylvania Coal Company vs. Mahon*, 43 S. Ct. 158, 260 U. S. 393, 67 L. Ed. 322, 28 A. L. R. 1321.

Question Presented

Whether the Pennsylvania Act of May 27, 1921, P. L. 1198, known as the Kohler Act, which prohibits and renders unlawful the mining of coal so as to cause the caving in, collapse or subsidence of public buildings or streets, violates the fifth and fourteenth amendments to the Federal Constitution, insofar as it relates to adjoining landowners where no privity of estate or contract exists?

Statute Involved

The pertinent provisions of the Statute are printed in Appendix A, infra pp. 1a-2a.

Statement

Petitioners, the School District and the Borough of Shenandoah, Schuylkill County, Pennsylvania, brought actions in trespass in the Court of Common Pleas of Philadelphia County against the City of Philadelphia in its capacity as Trustee under the Will of Stephen Girard, Deceased. Both actions sought to recover damages sustained as the result of a subsidence affecting a nine-block area of Shenandoah, alleged to have been caused by the negligent withdrawal of lateral support during the progress of secondary or pillar robbing mining operations conducted in an adjoining property owned by the respondent, and leased to a tenant.

The cases were consolidated for trial in the Court of Common Pleas No. 2 where they were tried before Judge Edwin O. Lewis and a jury which, on November 1, 1949, rendered verdicts for the Plaintiff School District in the sum of $430,721.54 and for the Plaintiff Borough in the sum of $431,813.57. The general verdict in each case was accompanied by special findings with respect to causation

and negligence made in answer to specific questions put by the Trial Judge, which will be referred to hereafter (R. 612, 613a).

Respondent, in its capacity as Trustee under the Will of Stephen Girard, owns extensive coal properties in Schuylkill County, including a colliery immediately adjacent to the affected portion of Shenandoah, and known as Kehley's Run Colliery. The School District's claim was predicated upon the total destruction of one high school building, the cost of repair of another which was seriously damaged and a loss in tax revenues due to a general reduction in tax assessment valuations occasioned by the decrease in value of privately owned damaged properties in the affected area. The Borough sought to recover for damages to street paving and municipally owned water and sewer lines and a similar loss in tax revenue.

Either by the pleadings or the undisputed proof offered at the trial, it was established that a general subsidence affecting an area of approximately nine city blocks occurred in the Borough of Shenandoah on the morning of March 4, 1940. The extent of the subsidence varied from a maximum depth in excess of three feet at its center to a minimum of a few inches at its outer boundary, with consequent severe damage to the public and private structures in the affected area.

The mineral rights directly beneath the subsided area had been owned for many years by the Philadelphia and Reading Coal and Iron Company, and constituted a portion of what was known as the Indian Ridge Colliery. No active mining had been conducted in this portion of the Indian Ridge Colliery since the year 1908. Immediately adjacent and to the north of the subsided area were the mine workings of the defendant (hereafter sometimes called the Girard Estate) known as the Kehley's Run Colliery, which had been in practically continuous operation through a long succession of tenants, since the year 1853.

On May 3, 1938, following the bankruptcy of a previous tenant, the defendant entered into a new lease for Kehley's Run Colliery for a term of ten years with the Morea Coal Company, a corporation owned by one Pasquale Antonizio. Under the terms of this lease, which was offered in evidence as Plaintiffs' Exhibit No. 2 and which will be discussed at length hereafter, the tenant was obligated to mine all of the remaining removable coal in Kehley's Run Colliery and to pay royalties to the defendant thereon, without regard to the rights of adjoining property owners or surface easement owners, unless restrained from so doing by a court injunction (R. 695, 6a).

Plaintiffs called three disinterested mining engineers as expert witnesses, all of whom testified that the cause of the subsidence was the pillar robbing operations conducted in Kehley's Run Colliery immediately to the north of the subsided area during the tenancy of the Morea Coal Company during the years 1938-39 and 40. The first two experts, namely, W. Arthur Williams and Frank H. Wagner, who were graduate registered mining engineers of many years experience in this particular area, also gave it as their opinion that the subsidence would have occurred as the result of defendant's tenant's operation if the Indian Ridge Colliery, which was directly under the subsided area, had never been mined at all. Both of these gentlemen, as the result of calculations made from official mining maps furnished either by the Philadelphia and Reading Coal and Iron Company or the Girard Estate, testified that approximately 75% of the original coal in place had been left by the Philadelphia and Reading Coal and Iron Company, while the Kehley's Run Colliery had been from 90 to 95 per cent exhausted before the lease with the Morea Coal Company was entered into in 1938.

Mr. Wagner testified that in his opinion, considering the area, the strata and the type of overburden, approximately 35 or 40 per cent of the original coal in place could

be extracted with safety to the adjoining surface, which would require 60 per cent to remain in the ground.

Plaintiff's third expert witness as to the cause of the subsidence, Adolph G. Kerewicz, who, while not a graduate or registered mining engineer, nevertheless had seventeen years actual practical mining engineering experience with the Philadelphia and Reading Coal and Iron Company, also testified that in his opinion the subsidence was caused by the removal of the pillars of coal on the Kehley's Run side of the land line. As this witness expressed it, "The removal of these pillars of coal on the Kehley's Run side, with the vein pitching southward, would have a tendency to crack at right angles to the vein. By so doing it would cause a subsiding far to the south of the land line and carry the subsidence area over the Indian Ridge property in the built-up section, or under the built-up section of the Borough of Shenandoah." (N. T. Page 281.)

Mr. Kerewicz also corroborated the testimony of the two previous experts to the effect that the Philadelphia and Reading Coal and Iron Company had left 75% of the coal under [illegible] the subsided area to support the surface (N. T. Page [illegible]). Both Mr. Wagner and Mr. Williams also testified, in effect, that because of the large percentage of coal which had already been removed from the Kehley's Run Colliery, before the 1938 lease, any further mining in this area was necessarily dangerous to the adjoining surface.

That the defendant knew the condition of the Kehley's Run Colliery prior to entering into the lease in question, if it needed any proof, was evidenced by an excerpt from the report of William Parkes Millington, its mining engineer and agent, for the year 1937, in which he advised the Girard Estate that the mine was rapidly approaching exhaustion. (R. 398, etc.)

The foregoing, in barest outline is a summary of petitioners' proof with respect to the cause of the subsidence and the negligence of the defendant. After the lengthy trial,

the jury in addition to the general verdict for the plaintiffs, found specially in answer to the questions put by the Trial Judge:

1. That the subsidence was caused by the failure of support of the Kehley's Run Mine;

2. That the defendant was guilty of negligence in entering into the 1938 Lease with the Morea Coal Company; and

3. That after the Lease was made in 1938, the defendant was guilty of negligence in permitting the Morea Coal Company to continue with its mining operations in the Kehley's Run Mine. (Record 613a.)

On February 4, 1950, after argument of Defendant's motions for a new trial and for judgment non obstante veredicto before their Honors Judges James Gay Gordon, Jr., Edwin O. Lewis, and Vincent A. Carroll, defendant's motions for judgment were granted and the motions for a new trial were discharged. The opinion of this court appears at (R. pp. 720a to 740a).

The opinion of the Supreme Court of Pennsylvania affirming the entry of judgments n. o. v. by the trial court was handed down March 19, 1951.

Specification of Errors to Be Urged

The Supreme Court of Pennsylvania erred:

1. In failing to give effect to the applicable provisions of the Kohler Act as imposing a liability upon respondent.

2. In failing to give effect to Section 10, the severability clause of the Kohler Act (Appendix A, p. 2a), which preserves its constitutionality as applied to the present factual situation.

3. In affirming the action of the Court of Common Pleas No. 2, in granting judgments n.o.v.

(Non Federal)

4. In affirming the opinion of the Common Pleas Court that petitioners had failed to prove the averments in their original statements of claim namely, that the lessee conducted mining operations and was robbing pillars of coal under the supervision, direction, management and control of the defendant (Respondent).

5. In affirming the opinion of the Common Pleas Court that plaintiffs' (petitioners') amendments to their original statements of claim introduced new causes of action which were barred by the statute of limitations.

Reasons for Granting the Writ

1. The opinion of the Pennsylvania Supreme Court necessarily involves a determination that the Kohler Act is unconstitutional in its entirety, and not merely to the extent decided by this Court in Pennsylvania Coal Company v. Mahon, 43 S. Ct. 158, 260 U. S. 393, 67 L. Ed. 322.

Petitioners maintained constantly throughout the trial and before the Supreme Court that the mere violation of the Kohler Act amounted to negligence "per se" under the law of Pennsylvania and elsewhere.[1]

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[1] In Jinks v. Currie, 324 Pa. 532, the Supreme Court of Pennsylvania said:

> "This principle of negligence per se was in mind when we decided *Lane v. Muller, Inc.*, 285 Pa. 161, 131 A. 718; *Zandras v. Moffett*, 286 Pa. 477, 133 A. 817; and *Hayes v. Shomaker*, 302 Pa. 72, 152 A. 827; and is embodied in the general summary in the Restatement, Torts, sec. 286, p. 752: 'The violation of a legislative enactment by doing a prohibited act . . . makes the actor liable for an invasion of an interest of another.' The majority rule is that the violation of a statute is negligence per se: 45 C. J. 720; 20 R. C. L. 38. In *Stehle v. Jaeger Auto Machine Co.*, 225 Pa. 348, 74 A. 215, we held that the violation of a provision of the factory act regulating the employment of children was negligence per se; and in *Johnson v. Endura Mfg. Co.*, 282 Pa. 322, 325, 127 A. 635, 636, we pointed out that the violation of a penal statute may constitute negligence per se."

It is equally well settled under Pennsylvania law that the violation of a statute need not be pleaded, Goldberg v. Friedrich, 279 Pa, 572, particularly where, as here, the salient facts which bring the case within the operation of the statute have been pleaded. The original statements of claim averred the mining, the consequent subsidence, and characterized the mining as unlawful. (R. 5a, 6a, 7a, 17a, 18a, 19a.) That was clearly enough under the principle of the *Goldberg* case.

Neither of the foregoing principles are disputed by the Supreme Court's opinion. What it appears to be predicated upon primarily is the proposition that petitioners failed to prove that the lessee conducted mining operations or robbed pillars under the *supervision*, *direction*, *management* and *control* of the defendant. That the lease, which was pleaded originally (R. 5a, 6a, 12a, 13a), and which was introduced in evidence in its entirety (R. 674a to 708a), gave respondent the *right* of supervision and control and in fact directed and obligated the lessee to remove all coal (R. 695a, 696a) is beyond any question. It was precisely this situation which the Kohler Act was designed to prevent when it provided:

> "It shall be unlawful for any owner, operator, director or general manager, superintendent or other person in charge of, or *having supervision over*, any anthracite coal mine or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause, etc."

It follows therefore, if the Kohler Act means what it so plainly states, the Supreme Court must have assumed its constitutional invalidity in arriving at its decision. Surely, causation and control were alleged and proven and specifically found by the jury's verdict and special findings. In failing to give the Act any effect at all, the Court simply assumed that the Act was no longer the law.

2. The constitutionality of the Kohler Act should be re-examined in the light of the facts of the present cases.

It will be remembered that the Act was originally held constitutional as a valid exercise of police power by the Supreme Court of Pennsylvania in *Mahon v. Pennsylvania Coal Company*, 274 Pa. 489 (1922), after the Court of Common Pleas had declined to afford injunctive relief, on the ground that the statute if applied to that case would be unconstitutional. A writ of error was granted, bringing the case to this Court which held the statute to be unconstitutional in *Pennsylvania Coal Company v. Mahon, supra*, in an opinion by the late Mr. Justice Holmes, with this careful introductory qualification (260 U. S. 413):

> "As applied to this case, the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far."

Wholly apart from the reasoning in the vigorous dissenting opinion of the late Mr. Justice Brandeis, in the *Mahon* case and without relying upon the desirability of a re-examination of the principles adopted by the majority opinion, petitioners contend that your honorable Court, as then constituted, would have arrived at the opposite result if the facts of the present case were then involved. One obvious distinction lies in the fact that in the *Mahon* case the right to mine coal had been reserved in the original deeds severing ownership of the mineral and surface rights (260 U. S. 414), while no such relationship had ever existed in the instant case. A second clear difference consists in the fact that no real public interest was involved in the *Mahon* case,[2] while the rights sought to be enforced here are

[2] "This is the case of a single private house," per Mr. Justice Holmes in 260 U. S. at p. 413.

wholly public in nature. A circumstance which will be discussed briefly in reason no. 3. The fact is that the Supreme Court of Pennsylvania has misconstrued an opinion of this Court interpreting the same statute and no power but this Court can correct the resulting injustice.

3. The question presented is an important one not because of the financial redress which the petitioners might obtain or only because of the future security which a reexamination might guarantee to them or to the individuals to whom they owe a public responsibility. It is vitally important in its public aspect to the future welfare of every inhabitant of a built-up anthracite community. This was recognized by the Supreme Court of Pennsylvania in its opinion when Mr. Justice Bell said (367 Pa. at p. 183): "The importance of this case to the coal regions is evidenced by the fact that 41 political subdivisions joined as intervenors in this suit." Not only did the intervenors join in the suit but through counsel filed a brief in support of the appeal, in which the applicability and constitutionality of the Kohler Act was stressed. A copy of said brief is contained herein as Appendix B.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS C. EGAN,
Counsel for Petitioners.

Date:

APPENDIX A

EXCERPTS FROM THE STATUTE

(Act of the General Assembly of Pennsylvania, approved May 27, 1921, P. L. 1198 (Act No. 445); 52 Purdon's Statutes §661.)

AN ACT

Regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties.

Section 1. Be it enacted, &c., That it shall be unlawful for any owner, operator, director or general manager, superintendent, or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of—

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations.

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

. . . . . .

Section 7. Any owner, operator, lessor, lessee, or general contractor, engaged in the mining of anthracite coal, or any president, director, general manager, superintendent or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, who shall violate any provision of this act, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine of not more than five thousand dollars, or

undergo imprisonment for not more than one year, both or either, at the discretion of the court.

Section 8. The courts of common pleas shall have power to award injunction to restrain violations of this act.

Section 9. This act is intended as remedial legislation, designed to cure existing evils and abuses, and each and every provision thereof is intended to receive a liberal construction such as will best effectuate that purpose, and no provision is intended to receive a strict or limited construction.

Section 10. It is hereby declared that the provisions of this act are severable one from another, and if, for any reason, this act shall be judicially declared and determined to be unconstitutional so far as relate to one or more words, phrases, clauses, sentences, paragraphs, or section thereof, such judicial determination shall not affect any other provision of this act. It is hereby declared that the remaining provisions would have been enacted notwithstanding such judicial determination of the validity in any respect of one or more of the provisions of this act.

. . . . . .

ARGUMENT

This brief is filed on behalf of forty-one intervenors, all public bodies, listed in Appendix B, comprising twenty-one cities, townships and boroughs, and twenty school boards. All the intervenors are located in the southern region of the Pennsylvania anthracite coal fields, within the counties of Schuylkill and Northumberland. The issues presented in the instant case are of vital importance to the many thousands of inhabitants for whom intervenors speak: the outcome relates closely to their lives and safety as well as to the millions of dollars they have invested in public buildings, public works, improvements, and to their private property.

The purpose of this brief is to discuss the law, the legislation and some of the fundamental concepts underlying these, as well as the factual background which prompted the decisions and led to the legislation directed to relief of the peculiar problems of those who live side by side with the anthracite industry.

In the first phase of development of large scale anthracite mining the operators removed only that coal from the virgin veins which could be removed with the maximum safety and minimum cost. This was called first mining. The conflict between the mining industry and the members of the public who lived on the surface above mining operations came with "second mining". "Second mining" or residual mining generally covers all reëntries into once mined areas for the purpose of removing the coal left in place by those who first mined the vein.

Second mining, which includes the practice of pillar robbing (R. 126a), though less profitable than first mining, was commercially and financially feasible (R. 126a). However, as second mining operations approached the point where the profit motive conflicted

with sound mining practices, the latter gave way to the former.

The temptation was to remove more coal than was consistent with the rights and safety of the surface owners. The amount of coal which could be taken out, and the amount which must be left in place to afford proper surface support varied from one location to another (R. 151a). In the immediate area of the subsidence involved in the instant case little or no second mining could be carried on without surface subsidence owing to the heavy pitch of the veins of coal.[1]

The widespread alarm in this area over the increasing number of subsidences led to the submission of numerous bills in the Pennsylvania Legislature, some of which were passed and became law.[2] The culmination of these concerted efforts for legislative control of the mine cave evil was the Kohler Act of May 27, 1921, P. L. 1198 (52 PS §661). *See Appendix "A".*

In signing the Kohler Bill, Governor Sproul stated that it was designed to guard ". . . against future and present dangers incident to the industry . . .", and to make ". . . reparation of damage to public and private property, to communities and to the whole prospect of life there . . ."[3] The very conditions that

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[1] In the Indian Ridge Colliery under Shenandoah, 75% of the original coal has been left in place since 1908 to support the surface of Shenandoah (R. 151a, 232a).

[2] 1911. Act of March 24, 1911, P. L. 26 (53 PS §2651 Note).

1913. Act of June 27, 1913, P. L. 639 (held unconstitutional in *Com. v. Alden Coal Company, Appellant,* 251 Pa. 134 (1915)).

1913. Act of July 26, 1913, P. L. 1439 (53 PS §2651).

1915. Act of June 1, 1915, P. L. 721 (repealed May 11, 1921, P. L. 479, Sec. 5).

[3] Legislative Journal of January 18, 1921, page 34; *Mahon v. Penna. Coal Co.,* 274 Pa. 489, 497 (1922).

are the basis of the litigation involved here were the same as those that prompted the Kohler Act.

The plaintiffs, in the case at bar, are the Borough of Shenandoah and the School District of the Borough of Shenandoah. The Estate of Stephen Girard was and is the owner of adjoining coal-containing property known as Kehley's Run Colliery. It was contended by the Borough and School District of Shenandoah, the plaintiffs, that their losses were caused through a subsidence resulting from the failure of support of Kehley's Run Mine; that the defendant Girard Estate was guilty of negligence in entering into a lease with the Morea Coal Company, under the circumstances involved; and, in permitting, directing and supervising these practices subsequent to execution of the lease. It was further contended that as a result of these wrongful acts, the surface area overlying the veins on the property of defendant was caused to subside and the lateral support of plaintiffs' property thereby removed. School buildings were destroyed and damaged; highways, sewer lines, water mains and service lines were broken; tax revenues were lost due to the diminution of value of private property damaged by the subsidence.

Plaintiffs proved that prior to the execution of the lease in 1938, there were approximately 577,000 tons of recoverable coal in the Kehley's Run Mine (R. 321a). Between 1865 and 1940, 9,940,941.11 tons had been removed (R. 245a). During 1938, 1939 and 1940 only 160,000 tons were removed (R. 246a), so that when the lease was made 92.16 per cent of all the coal in the colliery had been removed (R. 389a). Plaintiffs proved that defendants entered this lease notwithstanding the fact that the limit of safe extraction of coal was 35 per cent to 40 per cent (R. 151a), and notwithstanding the fact that defendant's own mining engineer and agent reported in 1937 that the Kehley's

Run Mine was rapidly approaching exhaustion. This state of facts made the lease unconscionable.

By the terms of the lease, Morea Coal Company could not leave any workable coal in the mine unless enjoined by an order of Court and the penalty for leaving any such unmined coal was the payment of a royalty to defendant for the coal left in place. It is further to be pointed out, by the terms of the lease under the heading marked "Coal Left to Support Surface", Morea was compelled to leave no coal unmined for the purpose of affording vertical or lateral support to any easement or structure upon or adjacent to Kehley's Run Mine.[4] By the very terms of the lease, defendant retained control of the mining operations of its lessee.[5] Any lingering doubt that defendant was in the coal business and thus, though a charitable trust, amenable to the rule of *Winnemore v. Philadelphia*, 18 Pa. Superior Ct. 625 (1902), must be dispelled by the testimony of its own Mining Engineer, William P. Millington, who said that he ran defendant's mining business (R. 70a).

Pursuant to the terms of the lease, Morea entered the leasehold and commenced operations. Morea removed more than 160,000 tons of the coal. On Sunday,

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[4] Under Art. XVI, paragraph of Lease headed "Coal Left to Support Surface" recites in part: "The purpose and intent of this requirement is that the lessee shall leave no coal unmined for the purpose of affording vertical or lateral support to any easement or structure upon or adjacent to the demised premises, when such easement or structure shall not have a proven legal right to such support, . . ." (R. 696a).

[5] For incidents of lessor-lessee relationship, see Art. XIX, (R. 699a) lessor's right of entry; Art. IX, (R. 688a) payment of taxes of leased premises by lessor; Art. XXIV, (R. 701a) lessor's right of distraint; Art. XXV, (R. 702a) forfeitures for failure to pay rent; Art. XXIII, (R. 701a) prohibitions against lessee's transferring, assigning, mortgaging or subletting without written consent of lessor.

March 4, 1940, the subsidence began. It continued for several days, and the damages referred to, supra, followed. Plaintiffs proved that this subsidence was caused by the negligent mining of defendant and its lessee in entering and executing the explicit terms of this unconscionable lease. Causation was established by plaintiffs when they proved defendant made the lease at a time when 90 per cent of the coal had been removed from its mine. It was shown by competent expert testimony that, in view of the nature, formation and pitch of the veins of coal in the area and the type of overburden, about 35 per cent to 40 per cent of the original coal in place could be removed with safety, but that 60 per cent would have to remain in the ground. It was definitely established that there were only about 577,000 tons of coal left in place after removal of more than 10,000,000 tons in the 75 years from 1865 to 1940.[6] Despite the hazardous nature of the undertaking and defendant's knowledge of all these facts (R. 145a), nevertheless defendant drew a lease which required further coal mining at the site until all the removable coal was extracted. It was shown that the actual cracking and shifting which caused the nine-block area in Shenandoah to subside took place in Kehley's Run Mine and was caused by defendant's negligence. All plaintiffs' experts said the cause of the subsidence of the nine-block area in Shenandoah was the removal of pillars in Kehley's Run Mine (R. 82a, 139a, 227a, 230a). They testified that from their own personal observations made at the time of damage and from defendant's own maps of the workings (R. 78a, 193a), pillars were actually being removed at the location in defendant's mine which would cause the subsidence in Shenandoah (R. 230a, 83a). Uncontradicted and ex-

[6] Kehley's Run Mine covered 42 acres with 12,000 feet of tunnels. Morea's operation was mere gleaning (R. 294a, 382a).

pert testimony of plaintiffs' mining engineers showed that the cracking and subsidence which certainly must follow such removal would tend to occur at right angles to the vein, and since the vein sloped southward at an angle of 20 degrees the actual subsidence would take place, as it did, to the south of the land line of defendant's mine and under the built-up section of Shenandoah (R. 227a, 230a). The jury heard the many witnesses of each side. It properly rejected the rather fanciful testimony of defendant's experts who said the subsidence resulted from failure of support in the Indian Ridge Mine. Indian Ridge operations had terminated in 1908 and had left 75 per cent of the removable coal in place (R. 152a, 232a). There had been no failure of the Indian Ridge pillars in 40 years (R. 152a). The Court submitted three special questions in addition to the general one, and the jury found specially that the subsidence was caused by failure of support of Kehley's Run Mine; that defendant was negligent in entering the 1938 lease with Morea Coal Company; and that defendant was guilty of negligence in permitting Morea Coal Company to continue mining operations in Kehley's Run Mine (R. 599a). The verdict for the Borough was $431,418.57; for the School District, $430,721.54.

In subsequent proceedings, the Common Pleas Court entered judgment non obstante veredicto, and plaintiffs appealed.

Intervenors have a legally enforceable interest in these proceedings. Sustaining the verdict of the jury is of tremendous importance to them for the salutary effect it will have in discouraging the use and abuses in similar leases. A lease which requires the lessee to leave no coal unmined for the purpose of affording vertical or lateral support, and which requires lessee to keep removing coal unless legally enjoined from doing so, and conducting operations in a manner regardless of the rights of adjoining property owners, is a

bad lease when we contemplate the welfare of the entire anthracite community. The judgment and opinion of the lower court runs counter to the affected interests of intervenors, and for this reason we urge that its correctness be closely examined. The Court below should not have entered judgment non obstante veredicto.

Although there is no absolute easement or right to lateral support except for land in its natural condition, this rule has no application where the removal of lateral support has been attended by acts of malice, wantoness or negligence: *Home Brewing Co. v. Thomas Coal Co.*, 274 Pa. 56, 60 (1922). The lower court found great comfort in the Home Brewing Company decision apparently because it, too, involved the same Kehley's Run Mine and the claim of an adjoining owner to lateral support. The similarity of our case and the *Home Brewing Company Case*, supra, stops with the fact that the same mine is involved. The lower court failed to recognize the important differences. In the *Home Brewing Company Case*, supra, no allegation of negligence was made, and none proven. In the instant case negligence was alleged and abundantly proven. Another element absent in the *Home Brewing Company Case*, supra, but present in our case is the very practical consideration of relative values from the viewpoint of public policy. The effect of the injunction in the former case was to take out of the market 450,000 tons of removable coal of a value greatly exceeding the worth of plaintiff's property. By way of contrast, in the instant case, there were only some 500,000 tons of all coal left in a mine that was 92.16 per cent exhausted at the time of entering the lease. In all the 42 acres and some 12,000 feet of workings, the value of all the coal was trifling when compared with the damage to plaintiffs' property as evidenced by the $862,140.11 verdict. In reality the damage was far greater than reflected by the verdict

because the owners of the individual properties involved were not parties in this action.

Further examination of the lower court opinion shows a disposition to usurp the function of the jury. The court rejected plaintiffs' evidence and substituted its own judgment for that of the jury when it held not only that plaintiffs failed to prove their case, but that all the factual evidence tended to show defendant was not at fault. The act of April 22, 1905, P. L. 286, Sec. 1, April 9, 1925, P. L. 221, Sec. 1 (12 PS §681) was not designed to vest the court with the power to substitute its own judgment for that of the jury, nor to disturb the distinction between the province of the court and the jury. The court is bound to view all the evidence in a light most favorable to the prevailing party, and should not enter judgment n. o. v. where there is any evidence upon the record from which the jury could have found for the successful party. In *Hostetler v. Kniseley*, 322 Pa. 248, 249 (1936) the late Chief Justice Kephart said:

> ". . . Under the Act of April 22, 1905, P. L. 286, the court cannot enter judgment n. o. v. where the evidence is conflicting on a material fact, or where any other reason exists precluding a binding direction: *Dalmas v. Kemble*, 215 Pa. 410; *Schwarz v. Glenn*, 244 Pa. 519, 524. The court does not determine questions of fact based upon disputed evidence; it merely reviews the whole case on the record and does subsequently what it would have been proper to do under a request for a binding direction: *Bond v. P. R. R. Co.*, 218 Pa. 34; *Smith v. Standard Steel Car Co.*, 262 Pa. 550. Appellee must be given the benefit of every fact pertaining to the issues involved which may be reasonably deduced from the evidence: *Kish*

v. P. R. R., 309 Pa. 439, 446; *Conley v. Simmons*, 312 Pa. 249. . . ."

In this case, there was conflicting evidence both as to negligence and as to causation. In view of the jury's findings, the trial judge should have resolved these conflicts in favor of plaintiffs. His further gratuitous statement that he considered the verdict against the weight of the evidence again reveals his failure to grasp the basic distinction between his function and that of the jury. A new trial will not be granted on the ground that the verdict is against the weight of the evidence where the jury would be justified in finding for either party because it must choose between conflicting testimony on material questions.

With this concluding observation, the intervenors respectfully submit that the action of the court below should be set aside and judgment entered for the plaintiffs in accordance with the verdict of the jury.

Respectfully submitted,

FRANK A. GALLAGHER,
Of Counsel for Intervenors.

APPENDIX "A"

Any discussion of the Kohler Act would be vain without first determining its applicability to the facts of this case. Section 1 of the Kohler Act of May 27, 1921, P. L. 1198 (52 PS 661) provides as follows: "It shall be unlawful for any owner, operator, director, or general manager, superintendent, or other person in charge of, *or having supervision over*, any anthracite coal mine, or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of . . ." (Italics added.)

It is patently clear from the 1938 lease from Girard Estate to Morea Coal Company, Article XIX, lease page 27 (R. 699a), and its other provisions, the Defendant reserved to itself the right to direct and control the manner and methods employed in Morea's conduct of the actual mining operations. Its avowed intention to supervise the operations through its mining engineer and other officers brings it clearly within the italicized portion of section 1 of the Kohler Act.

The Kohler Act was designed to regulate the mining of anthracite coal. Elaborating the portion of section 1 of the Act cited above, it was made unlawful so to mine anthracite coal as to cause the caving-in, collapse, or subsidence of (a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations; (b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public; (c) Any track, roadbed, right-of-way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by

the Public Service Company Law; (d) Any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed; (e) Any cemetery or public burial ground. Section 7 sets forth penalties for violation of the Act, and section 8 gives the courts of common pleas the power to award injunctions to restrain violations of the Act. It is further provided by section 9 that the act is intended to be remedial in nature ". . . designed to cure existing evils and abuses, and each and every provision thereof is intended to receive a liberal construction such as will best effectuate that purpose, and no provision is intended to receive a strict or limited construction." Section 10 states that all provisions of the Act are severable one from another.

In *Mahon v. Pennsylvania Coal Co.*, 274 Pa. 489 (1922), the legislation came before the Supreme Court of Pennsylvania for the first time and was held to be constitutional. Although this decision was reversed on appeal to the Supreme Court of the United States (*Pennsylvania Coal Co. v. Mahon*, 43 S. Ct. 158, 260 U. S. 393, 67 L. Ed. 322, 28 A. L. R. 1321 (1922)), this decision is not conclusive when applied to the facts of the instant case since the *Mahon* case is distinguishable on its facts. The facts of the *Mahon* case were specialized. Mahon and his wife sought to enjoin defendant coal company from mining coal under their house. The coal company had conveyed the surface to them but in express terms reserved the right to remove all the coal under them, and they took the premises with this risk and waived all claim for damages which might arise from mining out the coal. Consequently, the *Mahon* case involved the question of vertical support as compared with negligent removal of lateral support in the instant proceeding. The *Mahon* case was further limited in application because there existed privity of

contract as well as privity of estate between plaintiff and defendant. The majority opinion rejected the Act as destructive of valuable property and contract rights. Mr. Justice Brandeis, in a strong dissenting opinion, stated that the right of the owner to use his land is not absolute. He further stated that an owner may not so use his land as to create a public nuisance and that uses may become public nuisances with changing conditions although once harmless.

In the present proceeding, there is no question of the privity of contract or estate. Whereas the Supreme Court of Pennsylvania in the *Mahon* case was faced with the necessity of setting aside the contract rights of the plaintiff and defendant, no such problem was here presented. The Borough and School District of Shenandoah were adjoining landowners, and the protection they sought was from the negligent removal of lateral support in the mining operations under supervision of defendant.

The question of the applicability of the Kohler Act to the facts of the instant case was raised in the court below in the Borough case by plaintiff's fourth point for charge which read as follows (R. 636a):

> "IV. If you conclude that the subsidence was caused by the removal of pillars in the Kehley Run Mine in the vicinity of plaintiff's property, then defendant's conduct was unlawful and, as a consequence thereof, defendant was negligent under the provisions of the Act of May 27, 1921, P. L. 1198, 52 P.S. 661."

In the School District's case, it was raised by that plaintiff's fourth point for charge which read (R. 634a)

> "IV. If you conclude that the subsidence was caused by the removal of pillars in the Kehley Run Mine in the vicinity of plaintiff's property, then

defendant's conduct was unlawful and, as a consequence thereof, defendant was negligent, under the provisions of the Act of May 27, 1921, P. L. 1198, 52 P.S. 661."

Both points were declined by the Trial Judge and an exception noted for plaintiffs.

This brief is submitted on these exceptions.

The favorable finding of the jury established the fact that the subsidence was caused by the failure of support of the Kehley's Run Mine. The caving-in which originated in a mining operation supervised by defendant is a violation of the Kohler Act, and as such, negligence: Restatement, Torts, Section 286; *Jinks v. Currie*, 324 Pa. 532 (1936).

The verdict of the jury in favor of the Borough and School District of Shenandoah should be sustained. The Kohler Act is not intended to supersede the common law remedy of damages for negligent removal of lateral support which existed both prior and subsequent to passage of the Act. It is an aid to the common law in that it provides injunctive relief against the very set of conditions confronting plaintiffs here.

The plaintiffs have clearly established their right to a common law recovery against defendant for damages occasioned by the negligent removal of lateral support. However, in the light of the great issues of public concern that are present in this case which were not present in the *Mahon* case, supra, it is urged by the forty-one intervenors before this Court that the Kohler Act be reviewed. Its importance cannot be overemphasized both as to a control of mining practices in the future and as a legislative aid to determining liability in damages for past negligent conduct.

APPENDIX "B"

Following is a list of parties intervening in this appeal and their attorneys:

Party	*Attorney*
Blythe Township	Raymond L. Brennan
School Board of Blythe Township	Raymond L. Brennan
Butler Township	G. Harold Watkins
School Board of Butler Township	H. Franklin Kehler
Cass Township	Isadore Krasno
School Board of Cass Township	J. F. Mahoney
Coaldale Borough	B. J. Duffy
School Board of the Borough of Coaldale	B. J. Duffy
East Norwegian Township	Raymond Monahan
School Board of East Norwegian Township	Raymond Monahan
East Union Township	G. Harold Watkins
School Board of East Union Township	Frank Gallagher
School Board of Foster Township	G. Harold Watkins
Frackville Borough	John Walesky
School Board of Borough of Frackville	G. Harold Watkins
Gilberton Borough	James Bohorad
School Board of the Borough of Gilberton	G. Harold Watkins
Girardville Borough	John Lavelle
School Board of the Borough of Girardville	G. Harold Watkins

Party	*Attorney*
Kline Township	Adam D. Bavolack
School Board of Kline Township	Adam D. Bavolack
Mahanoy City Borough	James P. Bohorad
School Board of the Borough of Mahanoy City	Frank Gallagher
Mahanoy Township	James Bohorad
School Board of Mahanoy Township	James Bohorad
McAdoo Borough	John Skwier
School Board of the Borough of McAdoo	Adam D. Bavolack
School Board of the Borough of Minersville	John B. McGurl
New Philadelphia Borough	Ralph Bashore
Palo Alto Borough	Malcolm Reeves
School Board of Pine Grove Township	Charles Frank
Pottsville City	Harry Lightstone
School Board of the City of Pottsville	Malcolm Reeves
School Board of Reilly Township	Charles Frank
St. Clair Borough	Raymond Monahan
School Board of Schuylkill Township	Charles Frank
South Manheim Township	Charles Frank
Tremont Borough	Ralph Bashore
Union Township	Daniel J. Ferguson
West Mahanoy Township	Frank Gallagher
School Board of West Mahanoy Township	Frank Gallagher

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1950.

No. 119.

SCHOOL DISTRICT OF THE BOROUGH OF SHENANDOAH

THE BOROUGH OF SHENANDOAH,
A MUNICIPAL CORPORATION ORGANIZED UNDER THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

CITY OF PHILADELPHIA,
TRUSTEE UNDER THE WILL OF STEPHEN GIRARD, DECEASED,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Court of Common Pleas No. 2 of Philadelphia County appears at pages 720a to 740a of the record.

The opinion of the Supreme Court of Pennsylvania filed March 19, 1951, is reported in 367 Pa. 180 (Record 746-755).

Jurisdiction.

The petition does not set forth any ruling of the Pennsylvania Supreme Court of a nature such as to bring the case within the statutory provisions conferring jurisdiction on this Court.

The judgment of the Supreme Court of Pennsylvania is based upon non-federal grounds only. No federal question is involved.

The petitioners, in their petition (page 2), assert that the Supreme Court, in its opinion, did not specifically deal with the validity of the Act of May 27, 1921, P. L. 1198 (52 Purdon's Statutes sec. 661), and therefore the affirming of the judgments n. o. v. "necessarily presupposed" the unconstitutionality of said Act upon the authority of the opinion in *Pennsylvania Coal Company v. Mahon,* 260 U. S. 393, 43 S. Ct. 158, 67 L. ed. 322, 28 A. L. R. 1321.

Since the early decision of this Court in *Klinger v. Missouri,* 13 Wall. 257, 263, it has been consistently reiterated that jurisdiction cannot be founded on such a basis. As was aptly said by the late Chief Justice Hughes in *Lynch, et al. v. People of New York, ex rel. Pierson,* 293 U. S. 52, 55 S. C. 16 (1934), cited most recently in *Superior Court of California in and for County of Los Angeles, et al. v. Lillefloren, et al.,* 335 U. S. 906:

> "But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.
>
> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was ac-

tually decided or that the judgment as rendered could not have been given without deciding it."

Similarly: *Radio Station WOW v. Johnson,* 326 U. S. 120, 129 (1944).

Applying the principles consistently enunciated by this Court as controlling, in considering the opinion of the Supreme Court of Pennsylvania, it is abundantly clear not only that it does not appear affirmatively from the record that the decision of the constitutionality of the Pennsylvania Statute, the Act of May 27, 1921, P. L. 1198, was necessary to the determination of the cause, but, to the contrary, the decision of the Supreme Court of Pennsylvania was actually decided, and the judgment rendered, without deciding the question of the constitutionality of the Pennsylvania statute. It is plain from the opinion of the Pennsylvania Supreme Court that its decision affirming the judgments of the trial court was based solely on the application of the state law.

Petitioners instituted suits in trespass in the Courts of Common Pleas of Philadelphia County alleging that the damages suffered were occasioned by the removing and "robbing" of pillars of coal by the Morea Coal Company in certain of the seams of coal in Kehley's Run Colliery under a written agreement with the Respondent, wherein and whereby Morea Coal Company had been granted the exclusive license to mine, dig and carry away coal in and from all the beds or seams of coal upon the tracts of land, known as Kehley's Run; and that the Respondent in the exercise of due care was bound to foresee that mining so conducted would cause an extensive subsidence.

As to the validity of Petitioners' claims, the Supreme Court of Pennsylvania, in its opinion, ruled (page 748 of record): "There was no evidence to prove the facts on which each plaintiff based its claim or the negligence thus charged against the defendant."

Suit was not instituted against the alleged tort feasor, Morea Coal Company, the corporate entity in possession of, operating the mine, and in the opinion of the Supreme Court, the owner of the mineral estate. In their averments, however, Petitioners alleged that Morea Coal Company conducted mining operations under the supervision, direction, management and control of the Respondent. As to this contention the Supreme Court ruled (page 752 of record): "The Court below correctly held that there was no evidence to prove the averments in plaintiffs' statements of claim, that the lessee conducted mining operations or robbed pillars under the supervision, direction, management and control of the defendant."

After failing to prove their original allegations, Petitioners were permitted to amend during the trial and charge a new kind of negligence, to the effect that Respondent failed to exercise due care in entering into the "lease" of May 3, 1938, when it knew or should have known that the mine was practically exhausted and the removal of further coal would cause the withdrawal of lateral support and subsidence of Petitioners' property. As to this point the Supreme Court in its opinion (Record 753), in addition to holding the amendments were barred by the Statute of Limitations, ruled that Petitioners' "evidence to support their amendments was inadequate."

In concluding its opinion the Supreme Court of Pennsylvania states explicitly the two grounds upon which the cause was decided (Record 755). 1. Plaintiffs (Petitioners herein) failed to prove the averments in their original statements of claim, namely, that the lessee (vendee) (Morea Coal Company) conducted mining operations and was robbing pillars of coal under the supervision, direction, management and control of the defendant. 2. Petitioners amendments introduced a new cause of action barred by the Statute of Limitations.

That Petitioners' briefs and arguments as to the Act of May 27, 1921, P. L. 1198 were carefully considered by the

Supreme Court and the Act deemed not applicable in these cases is expressly stated by the Court in the concluding lines of its opinion (Record 755). "A number of other important legal questions were raised and vigorously argued by both appellants and appellee. We have considered them all, but deem it unnecessary to discuss them herein."

In view of the clear, precise language of the Supreme Court of Pennsylvania specifically enunciating the basis of its opinion on non-federal grounds, even the "supposition" of Petitioners, the sole basis of this Petition, would appear to be without foundation in fact or reason.

The rule enunciated in *Lynch, et al. v. People of New York, ex rel. Pierson* (*supra*), it is respectfully submitted is, therefore, controlling in this cause.

Question Presented.

There is no federal question presented by the record in this case. The only question of law presented is whether the Supreme Court of Pennsylvania correctly decided this case in accordance with the law of Pennsylvania.

Counter Statement.

Prior to his death, which occurred on December 26, 1831, Stephen Girard became the owner of certain tracts of land in Schuylkill County, Pennsylvania. By his Will (Plaintiffs' Exhibit No. 1—Record 641-674), dated February 16, 1830, probated at Philadelphia December 31, 1831, Girard gave his residuary estate to the City of Philadelphia, in trust for the several charitable uses and trusts therein mentioned, the major one being for the establishment of a college for poor white male orphans. Included in the real estate which came to The City of Philadelphia, as said trustee, were tracts of land in Schuylkill County. The City of Philadelphia, as trustee, administered the entire residuary estate of Girard through the executive and

legislative branches of the municipal government until the Supreme Court, in *Philadelphia v. Fox,* 64 Pa. 169 (1870), declared the Act of June 30, 1869, P. L. 1276 (53 P. S. secs. 6481-6486) constitutional. Since then the said residuary estate of Stephen Girard has been administered by the Board of Directors of City Trusts, created by said Act of 1869, as a department of The City of Philadelphia.

Years after Girard's death coal was discovered in some or all of said Schuylkill County tracts. Included therein was a tract then, or thereafter, known as Kehley's Run. On May 3, 1938, Respondent, the City of Philadelphia, Trustee under the Will of Stephen Girard, deceased, acting by said Board of Directors of City Trusts, denominated "Lessor," entered into a written agreement with the Morea Coal Company, a Pennsylvania corporation, denominated "Lessee," (Plaintiffs' Exhibit No. 2—Record 674a-708a), wherein it granted, subject to the covenants, terms and conditions therein specified, to said Company "the exclusive license to mine, dig and carry away coal in and from all the beds or seams of coal upon the tracts of land" specifically mentioned, known and constituting "Kehley's Run Colliery."

The Morea Coal Company was chartered by the Commonwealth of Pennsylvania. Its responsibility, reliability, solvency, efficiency and honesty at the time it entered into the agreement with the Respondent were not challenged at the trial. Its ownership was not discussed, nor was it material to the action.

After approval of said agreement by the Orphans' Court of Schuylkill County, Defendant's Exhibit No. 1 (Record 709a-719a), the Morea Coal Company entered into possession and continuously carried on its mining operations in said "Kehley's Run Colliery" from May, 1938 until the activity was interrupted on March 4, 1940 by a surface subsidence originating in the eastern portion of the Borough of Shenandoah the effect of which thereafter spread to the Kehley Run mine causing nine days thereafter aban-

donment by the Morea Coal Company of the workings immediately adjacent to the subsided area. The surface subsidence was entirely above the Indian Ridge mine which adjoined Kehley's Run. *There was no surface subsidence over the Kehley's Run mine.*

On February 28, 1946, just a few days short of the six years period fixed by the Statute of Limitations, the Borough of Shenandoah, caused a summons in trespass to issue (C. P. No. 6, March Term 1946, No. 898), as did the School District of the Borough of Shenandoah (C. P. No. 1, March Term 1946, No. 897), against Respondent, The City of Philadelphia, Trustee under the Will of Stephen Girard, deceased. In each Statement of Claim, filed April 9, 1946, it was charged that the aforesaid subsidence, and the damage to plaintiff's property resulting therefrom was due to the removing and "robbing" of pillars in certain of the seams of coal by the Morea Coal Company which, it was alleged, the defendant in the exercise of due care was bound to foresee. No act of negligence was alleged other than that pillars alleged to have supported Respondent's own land surface were being removed. No allegation was made that the subsidence was caused by "the *negligent* (emphasis supplied) withdrawal of lateral support," nor that the method or manner of removal was done otherwise than in a skilful manner. Respondent filed an affidavit of defense in each suit denying (1) that it was the owner of coal; (2) that the mining was conducted under its supervision, direction, management and control, and averring that mining operations were conducted by the lessee, Morea Coal Company.

The cases were consolidated and tried before Hon. Edwin O. Lewis, and jury, beginning October 17, 1949, and terminating on November 1, 1949.

At the trial Petitioners introduced the aforesaid agreement of May 3, 1938, between Morea Coal Company and Respondent (Plaintiffs' Exhibit No. 2—Record 674-708) under the terms of which Respondent did grant unto Morea

Coal Company the exclusive license to mine, dig and carry away coal in and from all the beds or seams of coal upon the tracts of land known as Kehley's Run Colliery for the term of ten years subject to the covenants contained therein, which included, inter alia, the payment of royalty with the proviso, however, that if it be decided, either by agreement of the parties or by arbitration under Article XXI, that the workable coal in the premises had been actually exhausted, then the lease would be at an end, and Appellee entitled to resume possession of the premises. Provision was made that wherever, in the regular course of mining operations, the time arrived for mining and removing coal lying vertically or laterally under any railroad, township or other road located or to be located on the surface of the premises, or under any stream, pipe line, pole line, or other easement, or under any structure upon the surface, and a dispute arose as to its removal, the matter would be referred to the board of arbitrators provided for in the agreement. In the event all the workable coal capable of being mined or shipped under the agreement had been so mined or shipped, then the agreement terminated. Further the agreement provided that in the event Morea should receive notice to remove coal which in its opinion would affect surface support, by filing a written statement with the Respondent setting forth its doubt of its legal right to remove the coal and its reasons therefor, it would not be required to proceed with mining, it would not be required to pay royalty on unmined coal, unless the Respondent in writing agreed to assume all liability for loss or damage to any third party by reason of Morea proceeding with the mining. Upon conclusion of the evidence on behalf of the Petitioners as to Respondent's liability, based on the testimony of three expert witnesses, its counsel moved for non suits, which were refused. The learned Trial Judge, over Respondent's objection, then permitted Petitioners to amend their statements of claim, introducing therein new and different allegations of negligence.

The amendments, inter alia, introduced the factual issues whether the condition of Kehley's Run Colliery, in 1938, at the time of the Morea agreement, was such that any further mining in Kehley's Run mine would be unsafe and that this was known by the Respondent when the lease was entered into. But Petitioners' own witnesses testified that at the time of the agreement over 577,000 tons of coal were recoverable with safety—(Record 322a); that depending on the mining methods employed possibly all the coal in the mine could be safely taken out—(Record 329a); that as to the number of years of good mining remaining, a conservative estimate would be ten years, there being approximately 1,100,000 tons of recoverable marketable coal in the mine—(Record 310a-311a). As to knowledge of the Respondent as to the condition of the mine at the time of the agreement the Petitioners' witness testified that in making a report to Respondent that the mine was rapidly approaching exhaustion he had in mind that it had ten good years of mining remaining—(Record 310a).

Following denials of Respondent's motions for non suits, the only eye witnesses who testified at the trial as to the condition of the two adjacent mines described the prior dangerous condition of Indian Ridge mine pillars (Record 432a, 455a).

These eye witnesses testified that conditions in Kehley's Run mine on and prior to March 4, 1940, were safe and workable (Record 415a, 449a, 475a). These factual witnesses further testified that Morea's employees were in Kehley's Run on March 4, 1940 after the subsidence in Shenandoah occurred and that the subsidence caused earth to be pushed from Indian Ridge mine into Kehley's Run mine so that on March 13, 1940 the men and mules had to be taken out of Kehley's Run (Record 436a, 437a, 455a, 481a).

Upon completion of the testimony the learned Trial Judge refused to affirm Respondent's point for binding instructions, allowing an exception. The jury found for the

Petitioners. Thereafter Respondent filed its motions for judgment n. o. v. and a new trial.

On February 4, 1950, after argument upon Respondent's said motions before their Honors, President Judge James Gay Gordon, Jr., Judges Edwin O. Lewis and Vincent A. Carroll, the motions for judgment were granted, in view of which the motions for new trials, which otherwise would have been granted, were dismissed.

The opinion of the Supreme Court, affirming the entry of judgment n. o. v. by the Court below, was filed on March 19, 1951.

In its opinion the Supreme Court, inter alia, made the following findings:

1. *There was no evidence to prove the facts on which each plaintiff based its claim or the negligence thus charged against this defendant;* (i.e., that from May 3, 1938, the lessee, Morea Coal Company, conducted mining operations in Kehley's Run Colliery *under the supervision,* direction, *management and control of the defendant,* its engineers, servants, agents and employees; that the lessee *under the defendant's supervision, direction and control* was engaged in second mining operations, that is, was "robbing" or removing pillars of coal in the several veins on said property and in consequence of this robbing, *the surface area overlying said veins* was caused to subside and the lateral support of plaintiff's property was removed thereby; and that the defendant was bound, in the exercise of due care, to foresee that the mining so conducted would cause an extensive subsidence) (Record 747-748).

2. The law is long and well settled in Pennsylvania that " 'the grant of a right to mine coal in the lands of the lessor and remove therefrom, although the instrument may be called a lease, is a grant of an interest in the land itself and not a mere license to take the coal'. The transaction . . . constituted a sale of the coal conditioned upon its being removed within the period specified" (Record 750).

3. Neither the vendor nor lessor of a coal mine is responsible in trespass for the negligent mining of his (so-called) lessee which results in damage to the surface (Record 751).

4. The trial court correctly held that there was no evidence to prove the averments in plaintiffs' statements of claim that the lessee conducted mining operations or robbed pillars *under the supervision, direction, management and control of the defendant* (Record 752).

5. The plaintiffs' amendments were barred (as the trial court correctly held in its opinion granting Judgment n. o. v.) by the Statute of Limitations and should not have been allowed (Record 755).

6. These cases (cited in the opinion) control in principle the instant case. It is therefore clear that the trial court was correct in holding that plaintiffs' amendments introduced a new cause of action and having been offered at least nine years after the plaintiffs' cause of action arose, were of course barred by the Statute of Limitations (Record 755).

7. Plaintiffs having failed to prove the averments in their original statement of claim, namely, the lessee (vendee) conducted mining operations and was robbing pillars of coal under the supervision, direction, management and control of the defendant, their cases against this defendant must fail (Record 755).

8. "A number of other important legal questions were raised and vigorously argued by both appellants and appellee. We have considered them all, but deem it unnecessary to discuss them herein" (Record 755).

(Italics throughout the above findings are those of the Pennsylvania Supreme Court.)

On March 27, 1951, petitioners filed with the Supreme Court of Pennsylvania a petition to hold record pending filing of petition for reargument.

On March 29, 1951, the petition to hold the record was granted.

On April 6, 1951, however, the petitioners having failed to petition for reargument, the Supreme Court, Per Curiam, entered this Order: "Remittitur exit and with record sent to: Prothonotary Court of Common Pleas, Philadelphia County" (Record 744).

On June 15, 1951, a Petition for Writ of Certiorari was filed.

Argument.

1. Determination of the constitutionality of the Kohler Act (Act of May 27, 1921, P. L. 1198, 52 P. S. 661) by the Supreme Court of Pennsylvania was unnecessary.

It is a fundamental rule of this Court and the Supreme Court of Pennsylvania that the Court will avoid the decision of constitutional questions which are unnecessary to a determination of the rights of the parties. *Thompson v. Consolidated Gas Corp.*, 300 U. S. 55, 75-76; *Driscoll, et al. v. Edison Light & Power Co.*, 307 U. S. 104, 115 (1939); *Com. to use v. Picard, et al.*, 296 Pa. 120, 124, 145 A. 794; *DeSarro v. Snowdon, et al.*, 157 Pa. Superior Ct. 150, 154 (1945) 42 A. (2) 89.

It is clear from the title of the Act, set out in Appendix A, pages 1a and 2a of the Petition, that the purpose of the Act was to prevent abuses in the anthracite coal industry by imposing sanctions on the *operators* of coal mines. It was never intended to regulate the sale or other disposition of mineral estates. It provides penal remedies and injunctive relief, and not, as in this instance, the recovery of money damages in a trespass suit.

Petitioners, at page 9 of their Petition, cite what they believe to be the controlling section of the Act, stressing that it is the operator, director or general manager, superintendent or other person in charge, or *having supervision over* (emphasis supplied by Petitioners) any anthracite coal mine, who is criminally responsible.

The opinion of the Supreme Court specifically finds as facts that the Respondent was not the owner of the mine (Record 750) not the operator of the mining operation (Record 750-752) and finally that the mining activity, which it is alleged by Petitioners caused the damage, was not done "under the supervision, direction, management and control of the defendant (Respondent)" (Record 752).

Petitioners admit that the opinion of the Supreme Court is predicated upon these findings of facts (page 9 of Petition) but insist that such findings were error. By admitting that the Supreme Court came to the conclusion that Respondent exercised no supervision over the coal operator, Morea Coal Company, Petitioners are compelled to *recognize that* the Court, as is its practice, did not pass on the constitutionality of the Kohler Act which applied only to owners, operators and those exercising supervision.

In insisting that the findings of fact made by the learned Trial Court and affirmed by the Supreme Court as to causation and control (Petition, page 9) were in error, Petitioners are asking this Court to exercise its jurisdiction merely to review a decision of a state court upon questions of fact. Such a prayer is not in conformity with the well established practices of this Court as set forth in *Portland Ry. Co. v. Oregon R. R. Comm.*, 229 U. S. 397 (1913), at 411:

> "Ordinarily, in cases which come before us for review, this Court accepts the facts as found by the state Supreme Court. An examination of the record in this case convinces us that the conclusions reached by the Court do not bring the case within that exceptional class where this court will reexamine the facts found, with a view to ascertaining the conclusions reached (citations omitted). In this case the facts found by the lower court and adopted in the Supreme Court are supported by competent testimony; and this court does not sit to retry issues of fact thus heard and determined by the properly constituted tribunals of the State having jurisdiction of the subject."

And again, as was later said by Mr. Justice Day, in *Miedreich v. Lauenstein*, 232 U. S. 236, 243 (1913):

> "This court has repeatedly held that in cases coming to it from the Supreme Court of a State it accepts

as binding the findings upon issues of fact duly made in that court."

This record demonstrates that the findings of fact were duly made and supported by competent testimony.

2. The Supreme Court of Pennsylvania has not misconstrued an opinion of this Court interpreting the Kohler Act but to the contrary has not been required to construe or even discuss the said Act in this proceeding.

The most recent discussion of the Pennsylvania Supreme Court as to the validity of the Kohler Act is to be found in the dictum in the case of *In re State Highway Route No. 185,* Schuylkill County (Glen Alden Coal Co.), 339 Pa. 149, 14 A. (2d) 76 (1940) where, in construing the provisions of the Act of May 26, 1937, P. L. 891, Chief Justice Drew said (pages 156, 157):

> "In holding an Act of this Commonwealth which attempted to impose liability upon those conducting mining operations of anthracite coal as to cause subsidence, *unconstitutional* (emphasis supplied), Mr. Justice Holmes, in *Penna. Coal Co. v. Mahon,* 260 U. S. 393, 415, said: "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights within the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right in the first place and refusing to pay for it because the public wanted it very much."

The Respondent in its brief and argument before the Supreme Court of Pennsylvania brought to the attention of the Court the opinion of Chief Justice Drew as to the unconstitutionality of the Kohler Act. Similarly the Petitioners, aided by the Intervenors, focused the attention of

the Court on the importance they attached to the belief that for the purposes of the facts in this case, readily distinguishable from the facts in *Penna. Coal Co. v. Mahon,* the Kohler Act was constitutional. This argument appears in the Brief for Intervenors contained in Appendix B of the Petition, being a copy of the Intervenors' Brief filed in the Supreme Court proceedings.

In view of these briefs and arguments, and the recognition by the Court of the Intervenors, it would appear indisputable that had the Supreme Court of Pennsylvania considered the Kohler Act applicable to the facts in these cases, it would have then passed on the question whether the decision in *Pennsylvania Coal Co. v. Mahon* rendered the Kohler Act totally unconstitutional, as contended by Respondents, or not conclusive when applied to the facts of the instant cases as insisted upon by the Petitioner and Intervenors. That neither the learned trial court nor the Supreme Court discussed the Kohler Act is conclusive that both tribunals found that the facts as proved did not establish a case within the applicable provisions of the Kohler Act. Any doubt as to the accuracy of this conclusion is dispelled by a reading of the opinion of the Supreme Court, wherein, as previously pointed out at length, the Court found that the Petitioners had failed to prove the averments of their Statements of Claim, and that there was a total failure of proof that Respondent exercised supervision, management, direction and control over the mining activities.

3. Finally, the language of the Petition itself sets forth a further reason why the prayer of the Petition should be denied. Nowhere in the Petition is an averment made that in the opinion of the learned trial judge or in the opinion of the Supreme Court of Pennsylvania was a finding made in accordance with the settled laws of Pennsylvania, that the Petitioners established by competent testimony the essential element of causation. To the contrary, the

finding of the trial judge, as to the cause of the Petitioners' damage, was (Record 740a): "There was a complete absence of proof of the allegations contained in the Statements of Claim that the Morea Coal Company's mining operations caused a subsidence of the surface of the Kehley's Run mine of the Girard Estate. The proofs as unfolded were that it was the surface over the Indian Ridge mine that caved in, and there was no adequate evidence that this collapse of the surface over the Indian Ridge mine was caused by a withholding of lateral support in the adjoining property of the defendant. On the contrary, all the factual evidence tends to show that the surface over the Indian Ridge mine subsided, and that, within two or three days thereafter, that subsidence caused earth to be pushed into the Kehley's Run mine, breaking down the barriers between the two mines. All the physical facts negatived the theories advanced by the plaintiffs' experts that the collapse had originated in the Kehley's Run mine and had destroyed the lateral support of the Indian Ridge land." The Supreme Court of Pennsylvania, in reviewing this finding of the trial judge, said "*There was no evidence to prove the facts on which each plaintiff based its claim or the negligence thus charged against this defendant.*" (Italics those of the Supreme Court of Pennsylvania. Record 748.)

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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